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**MAR 01 2007**

**OFFICE OF PETITIONS**

In re Application of	:	
Woloszko, et al.	:	DECISION
Application No.: 09/514,906	:	
Filing Date: 28 February, 2000	:	
Attorney Docket No. P-7326.03-DIV 3	:	

This is a decision on a petition filed on 21 August, 2006, alleging unintentional delay under 37 C.F.R. §1.137(b).

**NOTES:**

**Monitoring of the status of applications on Private PAIR and charges or lack thereof to one's deposit account can inform one's management of application responses and provide an indication when mailings of Office actions should be expected and/or if transactions have occurred.**

**Status Inquiries filed at three (3) or four (4) month intervals provide a demonstration of diligence and attention in supporting a petition seeking relief under 37 C.F.R. §1.181 because regulatory requirements require the filing of such a petition within two (2) months of the act complained of.**

For the reasons set forth below the petition as considered under 37 C.F.R. §1.137(b) is  
**GRANTED.**

### BACKGROUND

The record reflects that:

- Petitioner failed to reply to a non-final Office action mailed on 5 June, 2000, with reply due absent an extension of time on or before 5 September, 2000;
- the application went abandoned by operation of law after midnight 5 September, 2000;
- the Office mailed the Notice of Abandonment on 2 February, 2001;
- Petitioner avers that a petition to revive was transmitted on 27 September, 2001—and a copy of petition bearing a certificate of transmission so dated was submitted with the 21 August, 2006, filing—however, the record does not reflect receipt of the filing;
- the instant petition is accompanied by a fee authorization, as well as a reply in the form of an amendment, however, the statement of unintentional delay does not comport with the regulation.

**Therefore, Petitioner's incomplete statement of unintentional delay is being read to state that: the entire delay from the due date of the reply to the filing of a grantable petition was unintentional. If this not correct, Petitioner Stephen W. Bauer (Reg. No. 32,192) must immediately so notify the Office consistent with his duty of candor to the Office.**

### STATUTES, REGULATIONS AND ANALYSIS

Congress has authorized the Commissioner to "revive an application if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable." 35 U.S.C. §133 (1994).<sup>1</sup>

The regulations at 37 C.F.R. §1.137(a) and (b) set forth the requirements for a petitioner to revive a previously unavoidably or unintentionally, respectively, abandoned application under this congressional grant of authority.

The language of 35 U.S.C. §133 and 37 C.F.R. §1.137(a) is clear, unambiguous, and without qualification: the delay in tendering the reply to the outstanding Office action, as well as filing

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<sup>1</sup> 35 U.S.C. §133 provides:

**35 U.S.C. §133 Time for prosecuting application.**

Upon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Commissioner in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable.

the first petition seeking revival, must have been unavoidable for the reply now to be accepted on petition.<sup>2</sup>

Delays in responding properly raise the question whether delays are unavoidable.<sup>3</sup> Where there is a question whether the delay was unavoidable, Petitioners must meet the burden of establishing that the delay was unavoidable within the meaning of 35 U.S.C. §133 and 37 C.F.R. §1.137(a).<sup>4</sup> And the Petitioner must be diligent in attending to the matter.<sup>5</sup> Failure to do so does not constitute the care required under Pratt, and so cannot satisfy the test for diligence and due care.

(By contrast, unintentional delays are those that do not satisfy the very strict statutory and regulatory requirements of unavoidable delay, and also, by definition, are not intentional.<sup>6</sup>))

#### Allegations as to Unintentional Delay

The requirements for the granting of a petition under 37 C.F.R. §1.137(b) are a petition, fee, reply, showing/statement of unintentional delay, and—where appropriate—a terminal disclaimer and fee.

With the previously outlined presumption, Petitioner is appears to have satisfied the requirements of the regulation.

### CONCLUSION

The petition under 37 C.F.R. §1.137(b) is **granted**.

The instant file is released to Technology Center 3700 for further processing in due course.

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<sup>2</sup> Therefore, by example, an unavoidable delay in the payment of the Filing Fee might occur if a reply is shipped by the US Postal Service, but due to catastrophic accident, the delivery is not made.

<sup>3</sup> See: *Changes to Patent Practice and Procedure; Final Rule Notice*, 62 Fed. Reg. at 53158-59 (October 10, 1997), 1203 Off. Gaz. Pat. Office at 86-87 (October 21, 1997).

<sup>4</sup> See: *In re Application of G*, 11 USPQ2d 1378, 1380 (Comm'r Pats. 1989).

<sup>5</sup> See: *Diligence in Filing Petitions to Revive and Petitions to Withdraw the Holding of Abandonment*, 1124 Off. Gaz. Pat. Office 33 (March 19, 1991). It was and is Petitioner's burden to exercise diligence in seeking either to have the holding of abandonment withdrawn or the application revived. See 1124 Off. Gaz. Pat. Office *supra*.

<sup>6</sup> Therefore, by example, an unintentional delay in the reply might occur if the reply and transmittal form are to be prepared for shipment by the US Postal Service, but other pressing matters distract one's attention and the mail is not timely deposited for shipment.

While telephone inquiries regarding this decision may be directed to the undersigned at (571) 272-3214, it is noted that all practice before the Office is in writing (see: 37 C.F.R. §1.2<sup>7</sup>) and the proper authority for action on any matter in this regard are the statutes (35 U.S.C.), regulations (37 C.F.R.) and the commentary on policy (MPEP). Therefore, no telephone discussion may be controlling or considered authority for Petitioner's action(s).



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Office of Petitions

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<sup>7</sup> The regulations at 37 C.F.R. §1.2 provide:

**§1.2 Business to be transacted in writing.**

All business with the Patent and Trademark Office should be transacted in writing. The personal attendance of applicants or their attorneys or agents at the Patent and Trademark Office is unnecessary. The action of the Patent and Trademark Office will be based exclusively on the written record in the Office. No attention will be paid to any alleged oral promise, stipulation, or understanding in relation to which there is disagreement or doubt.